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In the

Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION and REGAL TUBE COMPANY,

Petitioners,

vs.

INDEPENDENCE TUBE CORPORATION,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Our opening brief and the *amicus* briefs of the Solicitor General and the major business groups clearly show the uncertainty and lack of principle in the "all the facts and circumstances" test employed by the Seventh Circuit to resolve the troublesome issue of intra-enterprise "conspiracy."[1] Unable to respond to these decisive criticisms, respondent has turned to a blizzard of factual details supporting the tort verdict it already has received, and has substi-

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[1] *See, e.g.*, Pet. Br. at 33-35; Brief for the United States ("U.S. Br.") at 23-24; Brief of the Chamber of Commerce of the United States and the National Association of Manufacturers ("Chamber/NAM Br.") at 10-12; Brief of the Kaiser Aluminum & Chemical Corporation ("Kaiser Br.") at 15-17.

tuted a novel two-part test designed to provide antitrust treble damage recovery for the same tort.

Respondent's bipartite test pays lip service to the Seventh Circuit's multi-factored inquiry into whether the affiliated corporations "functioned as distinct economic units," but places its major emphasis on "whether each corporation engaged in activities to unreasonably restrain the trade of third parties." (Resp. Br. 13; States Br. 5) This dualistic approach has, so far as petitioners can determine, no precedential support:

—It was not adopted by the trial court, either in its instructions to the jury or its rulings on post-trial motions;

—It was not accepted by the court of appeals;

—It has never been articulated in any opinion by this Court; and

—It does not appear in the language of the Sherman Act or its legislative history.

Respondent's test would compound, rather than eliminate, the critical flaws in the intra-enterprise conspiracy doctrine. What is required is a clear and well-grounded rule—as proposed by petitioners, the United States, the business community, and respected commentators—that a parent and its wholly-owned subsidiary do not provide the plurality of actors required for a conspiracy under Section 1 of the Sherman Act.

I. Neither The Act, Its Legislative History, *Stare Decisis*, Nor Administrative Practice Precludes Reassessment Of The Intra-Enterprise Conspiracy Doctrine.

The very fact that respondent and the *amici* States have themselves fashioned a new and untried approach to the intra-enterprise conspiracy doctrine undermines their claim that this Court is barred by its prior opinions, the statutory language and history or earlier views of the federal enforce-

ment agencies from reexamining the doctrine. (Compare Resp. Br. 15-33) The plain truth is that the doctrine was never considered during the legislative proceedings, which is why no court or commentator has relied on those proceedings in considering whether a parent and a wholly-owned subsidiary can alone constitute a plurality of actors. While this Court's own opinions are concededly more to the point, the court below and numerous scholars have regarded much of the Court's treatment of the intra-enterprise conspiracy issue as dicta. (691 F.2d at 318; Cert. App. A-12; Pet. Br. 25-32) Whatever the characterization of the prior opinions, it is evident that the doctrine is a creation of this Court. As such, it is open to reformulation to resolve the "continuing controversy and confusion, both in the scholarly journals and in the federal courts." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 47 (1977).

A. The statutory scheme does not require continuation of the current doctrine.

Respondent's assertion that, because the statute prohibits "every form of concerted activity," it necessarily applies to agreements among affiliated businesses, is unsupportable. (Resp. Br. 15) This Court stressed in *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 687 (1978), that this all-encompassing language begins, rather than ends, the inquiry: "One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says." What concerted activity should be covered must be based on a careful assessment of the overall statutory scheme.

As emphasized by petitioners and the United States, the Act distinguishes (a) conduct such as the trust device that reduces the number of truly independent economic decisionmakers (the subject of Section 1), from (b) conduct that is unilateral in effect (the subject of the more limited sweep of Section 2). To have an agreement or conspiracy within the meaning of the statute, there must be separate actors undertaking to do something they would not have otherwise done independently. (Pet.

Br. 43 n.34) Where, as here, a parent and a wholly-owned subsidiary are not independent entities but are lawfully joined as a single economic enterprise, their activities properly fall outside the scope of Section 1, notwithstanding that, for reasons of efficiency or convenience, they have adopted separate legal existences.

This purposeful distinction between Sections 1 and 2 is neither "novel" nor "artificial," as respondent contends. (Resp. Br. 20-21) Rather, it has been explicitly recognized by courts and commentators alike. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940); *Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581, 588-89 (8th Cir. 1981); Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo L. Rev. 23, 67 (1981).

Accordingly, there is no merit to respondent's claim that petitioners are seeking an "exemption" from the Act. (Resp. Br. 58) On the contrary, petitioners seek to give effect to the plain intention of the statute by asking this Court to recognize that action on the part of a parent and its wholly-owned subsidiary is not the action of two independent entities, but is in fact the action of a single economic and competitive entity, which should properly be adjudged under Section 2, not Section 1.

B. The legislative history never addressed the doctrine.

The legislative history does not "establish," as respondent urges (Resp. Br. 15 *et seq.*), that a parent and its wholly-owned subsidiary must be regarded as capable of "conspiracy" under Section 1. Despite a large and growing body of case law and extensive scholarly analysis, respondent is unable to cite a single opinion or commentator that has looked to the legislative proceedings as the source of the doctrine. Rather, these authorities uniformly follow the court below in finding its genesis in "sweeping Supreme Court dicta," commencing with *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), which never mentioned the legisla-

tive debates as a basis for applying the doctrine. (691 F.2d at 318; Cert. App. A-12)

The reason for this void is that Congress did not address the question of "conspiracy" between parent and subsidiary during the 1890 debates, much less the later intra-enterprise conspiracy doctrine or respondent's current reformulation. Respondent's attempt to create the contrary impression from scattered legislative remarks, such as its claim that Senators Sherman and Teller "alluded" to the doctrine (Resp. Br. 20), is both misleading and misconceived. In point of fact, there is not a single passage from the legislative debates in which a "conspiracy" solely between a parent and its wholly-owned subsidiary was discussed.

Typical of respondent's strained attempt to find significance in innocuous statements from the floor is its quotation from Senator Sherman to the effect that, "whether . . . combinations are by individuals, partnerships, or corporations, when the purpose of the combination or its plain tendency is to prevent competition, the courts have enforced the rule of the common law and have vigorously used the judicial power in subverting them." (Resp. Br. 19; quoting 21 Cong. Rec. 2459 (1890)) This recites nothing more than the long-standing rule that a conspiracy may involve "individuals, partnerships, or corporations." It says nothing about whether such a conspiracy may be found among wholly-owned affiliates or their officers and employees.

Most of respondent's other legislative history comes down to generalized statements about the dangers of "combinations." These statements merely demonstrate that the framers' principal target was the "trust," a device by which a group of previously independent corporations were combined or merged into a new entity to achieve anticompetitive purposes. Contrary to the contention of respondent and the *amici* States (Resp. Br. 19-20; States Br. 10), Section 1 was extended to "combination[s] in the form of trust or otherwise" to ensure that all means used by competitors unlawfully to merge or combine would be covered, not to

broaden the section's coverage to cases of purely intra-enterprise "conspiracy."

C. This Court is not constrained by *stare decisis* from reevaluating the intra-enterprise conspiracy doctrine.

Consistent with the weight of scholarly opinion, petitioners' opening brief demonstrated that the intra-enterprise conspiracy doctrine was unnecessary to all or nearly all of the Court's decisions in which it has figured. (Pet. Br. 25-32) This was not, as respondent argues, an attempt to "explain away" this Court's prior cases. (Resp. Br. 24 n.14) Rather, it was designed forthrightly to show that this Court has never addressed, or been required to address, the serious theoretical and practical objections to the doctrine. Accordingly, a reexamination of the doctrine is both appropriate and consistent with *stare decisis*.

Respondent is on especially weak ground when it argues that the Court is bound on the intra-enterprise conspiracy issue by the "first Sherman Act cases to reach this Court." (Resp. Br. 22) Neither the lower courts, the commentators nor the later line of cases originating with *Yellow Cab* relies on these earlier authorities as a basis for the doctrine. Just as respondent has done in its discussion of the legislative history, it misreads broad statements about trusts and combinations among previously independent corporations as statements relating to the activities of affiliated corporations that have already lawfully combined. To the extent the early cases discussed the conduct of "trusts" after their formation, they did so either in the context of a companion charge under Section 2 or as the fruit of an unlawful combination.

While *Yellow Cab* was thus the genesis of the intra-enterprise conspiracy doctrine, it did resemble the earlier cases in holding that corporate acquisitions that are designed to achieve an unreasonable restraint of trade violate Section 1. It was in this context that *Yellow Cab* announced that such a restraint "may result as readily from a conspiracy among

those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent." (332 U.S. at 227) Although this language accurately stated the law with respect to the conduct of an enterprise that was itself the product of unlawful affiliation (as with the early trusts), the Court did not so limit its language. It was the resulting dicta that gave rise to the intra-enterprise conspiracy doctrine.

The *Yellow Cab* language was repeated but without further analysis in a series of cases, including *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110 (1948), *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), and *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951). Among these early decisions, only Justice Jackson's dissent in *Timken* examined the critical problems with the doctrine, which he said placed "too much weight on labels" by artificially dis nguishing between unincorporated divisions and subsidiaries. (341 U.S. at 607) That criticism was echoed in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), where the Court suggested that the doctrine "impose[s] grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect." (*Id.* at 29)

The *Yellow Cab* dicta was nevertheless resurrected in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968). But Justice Black's broad implication there that a parent and its subsidiary are *always* capable of conspiracy, contrasts with the Court's conclusion only seven years later in *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86 (1975) that considerations of economic reality and antitrust policy should limit the doctrine's application. The shifting fortunes of *Yellow Cab* hardly constitute the "unchanging analysis" claimed by the *amici* States. (States Br. 12)

The end result has been thoroughgoing confusion on the part of those seeking to apply this Court's rulings. Respondent has no answer to—indeed does not mention—the conflict

among the circuits. Moreover, respondent glosses over the difficult counseling problems that have been created by the lower courts' inability to devise a consistent and principled rule. Although respondent tries to sweep aside the academic criticism of the doctrine, its own authorities acknowledge that "[s]cholars and commentators have been uniformly critical" of this Court's rulings. (R. Posner & F. Easterbrook, *Antitrust: Cases, Economic Notes and Other Materials* 730 (2d ed. 1981); cited at Resp. Br. 51)

In short, respondent errs in asserting that *Continental T.V., Inc.* v. *GTE Sylvania Inc., supra*, "is not an apt analogy." (Resp. Br. 60 n.54) Just as in *GTE Sylvania*, this Court is called upon to reconsider a doctrine that has become an "exercise in barren formalism" and "unresponsive to the competitive needs of the real world." (433 U.S. at 47, 48 n.13) The existing rule has generated tremendous confusion among the lower courts as they have "struggled to distinguish or limit [the Court's prior decisions] in ways that are a tribute to judicial ingenuity." (*Id.*) And here, too, "the great weight of scholarly opinion has been critical of the decision" and has called for its elimination. (*Id.* at 47-48)

D. The current and considered views of the antitrust enforcement agencies should be given great weight.

In response to the express invitation of this Court, the Solicitor General stated the views of the United States Department of Justice and the Federal Trade Commission, in support of certiorari. They have since filed a carefully reasoned brief urging the adoption of the same rule as that advanced by petitioners. This is not a "revisionist view," as respondent would like this Court to believe (Resp. Br. 32), but a well-considered articulation of what are now well-accepted antitrust and economic principles.

Although respondent asserts that the government has "repeatedly initiated enforcement actions" based on the earlier intra-enterprise conspiracy doctrine, it is unable to cite a single case in the last 15 years where the government has

alleged a conspiracy solely between a parent and its wholly-owned subsidiary.[2] Respondent's efforts to piece together a contrary position from the scattered statements of Justice Department officials is equally misplaced. Respondent confuses statements of what the law *appeared to be* with what the officials believed the law *should be*. Indeed, respondent's assertion that then Assistant Attorney General Turner endorsed the doctrine ignores his statement immediately preceding the language quoted in respondent's brief (Resp. Br. 31):

> "We certainly don't generally favor a bathtub conspiracy charge and, in fact, it is not the happiest of legal doctrines in any context." (34 ABA Antitrust L.J. 113, 122-23 (1967))

Respondent and the *amici* States also misinterpret the twenty-five year old *Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955). The *Report* was not a statement of government policy. Moreover, while some Committee members sought to reconcile this Court's early decisions by suggesting a distinction between parent-subsidiary activities directed at "the trade of strangers" and those of an "internal" nature, the only *consensus* reached by the Committee was that:

> "It is obviously unrealistic to expect or to command wholly-owned affiliates to compete. Insofar as the decision in *Kiefer-Stewart*, or the decree in *Timken* may be considered to rest on such a hypothesis, we recommend that the Supreme Court reconsider it." (*Report* at 36)

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[2] The recent cases referred to in Resp. Br. 30 n.20 all involved conspiracies with third parties. Respondent's frequent reliance on the government's brief in *Citizens & Southern* is misplaced. *Citizens & Southern* involved an effort to impose liability on affiliated defendants where only 5% stock ownership was present. This is not inconsistent with the government's assertion here that the intra-enterprise conspiracy doctrine should not be applied when more than 50% ownership is present.

II. Respondent's Proposed Test Is Without Precedential Support And Fails To Resolve The Doctrine's Critical Policy And Practical Shortcomings.

The final irony in respondent's *stare decisis* argument is that nowhere in this Court's opinions (or the legislative history for that matter) is there any mention of the two-part test now advanced by respondent and the *amici* States. Even the Seventh Circuit did not adopt the suggestion that a "restraint on third parties" standard should become part of its "all the facts and circumstances" approach to the capacity issue, although the point was expressly urged in respondent's brief below. (Br. of Appellee 29-33) Likewise, the district court's capacity instructions contained no reference to "restraint on third parties," despite respondent's request that it be included. (*See* Pet. Br. 37-38)

The "third-party restraint" test only aggravates the uncertainties that already exist in the "all the facts and circumstances" test. Respondent asserts that the Seventh Circuit's test is concerned with whether parent and subsidiary are "distinct" economic units (Resp. Br. 33), but it identifies *no factors* that can or should be used for making this determination. Rather respondent engages in definition by repetition. It refers to "functional separateness," "separate economic operating units," "real, rather than merely formal, distinctness," "autonomous units," "separate actor[s]," "separate economic units," "separate businesses" and "independent business units," without ever explaining what these phrases mean or what evidence is relevant to making the requisite determination. (*Id.* at 35, 36, 37, 39, 42, 44)[3]

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[3] When applying these amorphous terms to petitioners, respondent simply tailors its selective recitation of the facts to create an impression of "distinctness," while ignoring the contrary evidence that Regal was in all important respects dominated and controlled by Copperweld, whose officers or directors held all of the offices or directorships at Regal. (*See* Pet. Br. 4 n.4)

The unfairness, as well as the unpredictability, of such an approach is dramatized by this litigation, where petitioners started the case relying on the five-factor test from *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980), were then met with the district court's nine-part instruction, and now must deal with still another formulation by respondent. What makes the result especially untoward is that the "all the facts and circumstances" test ultimately focuses on the wrong issue—namely, the supposed operational "separateness" of parent and subsidiary. As the Chamber of Commerce and NAM explain:

> "The thrust of rules such as the 'all facts and circumstances' [test]...is to find liability where subsidiary corporations, though subject to the ultimate control of the parent, are given some delegated day-to-day operational autonomy. The rules thus have the perverse effect of discouraging decentralized decisionmaking within a business enterprise, even as they are applying Section 1 on the theory that separate decisionmaking within a multi-corporate enterprise should be preserved." (Br. 12)

Respondent's assertion that Copperweld and Regal should be treated separately because each wielded its own "economic leverage" is a confusion of terms. (Resp. Br. 37) Regal had no more—nor less—economic power than it did at Lear Siegler, or than any of Copperweld's unincorporated divisions possessed. Regal was a separate legal entity, but it was not independent of Copperweld. Any "leverage" obtained by Regal through its customer and supplier relationships was in fact controlled by Copperweld, which retained ultimate authority over Regal's long-term production decisions, sales plans and finances. (Breedlove Tr. 4913, 4921-29; *see* Pet. Br. 4 n.4) Moreover, third parties were made fully aware of this control relationship, since Regal correspondence expressly identified it as "a Copperweld enterprise." (*E.g.*, Jt. App. A-81, A-97)

Further, respondent has no real response to the criticism of responsible commentators and the courts that the "third-party restraint" part of its test is "unworkable and unreal." (*Ogilvie, supra*, 641 F.2d at 588 n.20; *see also* Handler & Smart, *supra*, 3 Cardozo L. Rev. at 50-51; Note, *"Conspiring Entities" Under Section 1 of the Sherman Act*, 95 Harv. L. Rev. 661, 673 n.70 (1982)) Wholly lacking in such a test is any principled basis for making the critical distinction between so-called "legitimate internal decisions" by affiliated corporations and those that "restrain" others. As the Chamber of Commerce and the NAM correctly point out in their brief:

> "In practice, most pricing, marketing, and selling policies are designed at least to affect the trade of third parties, and virtually all such decisions will in fact have an effect on competitors even if they are not so designed. A competitor who is particularly affected by such a decision and who suffers serious injury will almost always be able to state a *prima facie* claim, sufficient at least to get to a jury...." (Br. 11)

Accordingly, it is hollow to claim that businessmen will have little difficulty in distinguishing between those activities that could be subject to attack and those that will not.[4] In fact, it is hard to reconcile respondent's assertion that the "third party" standard will have only limited impact, with the States' disquieting assertion that there are "an infinite number of ways" by which a parent and its subsidiary can "restrain the trade of strangers to the corporate family." (States Br. 19-20)

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[4]Respondent's misstate the record when they suggest that petitioners were "well aware" in this case that the conduct giving rise to liability "raised serious antitrust questions." (Resp. Br. 49) There is *no evidence* that petitioners thought they were violating the antitrust laws when they sent their letter to Yoder. To the contrary, the Seventh Circuit made it clear that petitioners consulted with counsel and acted on the advice of counsel in sending the letters. (691 F.2d at 314; Cert. App. A-4)

III. This Court Should Adopt The Rule Proposed By Petitioners, The United States And The Business Community That A Parent And Its Wholly-Owned Subsidiary Are Incapable Of A Section 1 Conspiracy.

In lieu of the unwise and unworkable two-part standard proposed by respondent and the *amici* States, which would compound the deficiencies in the standard applied below, this Court should adopt the straightforward rule that a parent and its wholly-owned subsidiary do not provide the plurality of independent actors required by a proper construction of Section 1. As demonstrated in petitioners' opening brief and reinforced by the *amici* briefs of the United States and the business community, such a rule would remedy each of the four critical deficiencies that have been identified in the present intra-enterprise conspiracy doctrine. Neither respondent nor the States respond persuasively to any of these points.

A. A legal control test would eliminate the formalistic distinction between subsidiaries and divisions.

The first advantage of petitioners' proposed rule would be to "put an end to the artificial distinction between unincorporated divisions and wholly-owned subsidiaries and to the confused rulings it has generated." (Pet. Br. 42)[5] The rule would recognize that a parent and its wholly-owned subsidiary, like a parent and its unincorporated division, do not act independently, but have a unity of interests in every legal, economic and practical sense. This is brought home by the parent's undoubted power to exercise ultimate and complete

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[5] This formalism is illustrated by the result in this case. The effect here was to find Regal "distinct" from Copperweld based on Regal's control of its day-to-day operations, even though it was indistinguishable from the other businesses Copperweld has set up as unincorporated divisions, which had similar day-to-day autonomy. Here, Regal had the identical control over its operations under Copperweld as it possessed when it operated as an unincorporated division of Lear Siegler.

decision-making authority, including the authority to switch from subsidiary to divisional format.

The rule would further recognize that a subsidiary should not be treated differently merely because corporations are technically defined as "persons" under Section 8 of the Sherman Act. For sound reasons, the courts have long held that a corporation and its officers and employees—which are also defined as separate "persons"—cannot alone conspire (*see* Pet. Br. 16-17), since the corporation can only act through its officers and employees. Here, the actions of the subsidiary are always ultimately subject to the complete control of the parent.

Respondent seeks to escape these salient arguments by standing them on their head. Respondent accuses petitioners of proposing a "purely formalistic" rule that would "ignore the legal entity of the corporation and would create a legal fiction consisting of all affiliated firms (the 'enterprise')." (Resp. Br. 52) It is no "fiction," however, to treat commonly owned *legal* entities as a single unit for Section 1 purposes because they are in reality a single *economic* enterprise.[6]

Respondent further argues that, even if a parent and its wholly-owned subsididary are a single economic enterprise, they should not be allowed "to derive all of the advantages of separate incorporation while avoiding all of the obligations flowing therefrom." (Resp. Br. 53) The fallacy in the argu-

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[6]It is surprising that respondent should cite Professor Blumberg's *The Law of Corporate Groups* (1983) for a different view. (Resp. Br. 52 n.6; *see also* 43, 47) His entire text is an argument against reliance on separate incorporation:

> "Large-scale operations typically organize themselves in the form of a number, usually a larger number, of constituent companies through which the business of the group is conducted. Whatever the legal distinctions between the constituent parts of the enterprise, the parent and subsidiaries, in reality, comprise a single enterprise and, in most cases, a single integrated enterprise." (p. 37)

ment is that there is no reason to believe that the alleged "advantages of separate incorporation" have any correlation with anticompetitive consequences. On the contrary, Professor Areeda has stressed that:

> "The business, tax, social, or strategic reasons for separate incorporation do not make it any more or less likely that competition is being harmed by the defendant's activities. The fortuity of independent incorporation does not serve to identify the behavior that the antitrust laws should control." (P. Areeda, *Antitrust Analysis* ¶ 334, at 399-400 (3d ed. 1981))

Consequently, any advantages of separate incorporation should be addressed by referring to the relevant corporate, tax or other legal policies, not by perverting antitrust doctrine.

B. A legal control test would promote efficiency and consumer benefit.

The second important advantage of a wholly-owned subsidiary rule is that it permits parent firms to organize their economic enterprises on the basis of efficiency, not corporate formalities. Respondent's intimation (Resp. Br. 48) that no "real efficiency" may result, or that consumer benefits are unimportant, is effectively answered by the Chamber of Commerce and NAM, which first review the many legitimate reasons for selecting separate incorporation, and conclude:

> "All these diverse reasons for separate incorporation . . . are geared towards either affording a business enterprise an opportunity to compete or enhancing its competitive posture. In some cases, the use of separate corporations is necessary in order that the enterprise may compete at all in a particular country or state or in a particular line of business. In many cases, the result is to increase output, improve efficiency, and benefit

consumers—all objectives that a sound antitrust policy seeks to facilitate." (Br. 8)[7]

Respondent is also wrong in suggesting there is "absolutely no support" for the notion that "the creation of subsidiaries has been deterred by reason of the Court's decisions." (Resp. Br. 47) Following both *Kiefer-Stewart* and *Timken*, the defendants in those cases reorganized into unincorporated divisions. (*See* Pet. Br. 18 n.12) Moreover, each of the *amici* business groups emphasizes the disrupting effects that will flow should this Court accept the ill-defined and ill-advised standard put forward by respondent and the court below. (Chamber/NAM Br. 9-10; Can. Br. 14-15; Kaiser Br. 5, 7-8)

C. A legal control rule would reconcile the intra-enterprise conspiracy doctrine with the statutory scheme.

A third advantage of petitioners' suggested rule is that it gives effect to the distinction drawn by Congress between the scope of Sections 1 and 2. The present doctrine obscures this distinction by permitting plaintiffs "to plead their way around basically unilateral action taken by an entity that lacks the market power to be sued under Section 2's monopolization standards." (691 F.2d at 317; Cert. App. A-10; summarizing the views of the commentators) In *Ogilvie* v. *Fotomat Corp.*, *supra*, 641 F.2d at 589, the Eighth Circuit reversed a jury finding of parent-subsidiary conspiracy for this very reason:

> "Congress has distinguished courses of conduct which are illegal when undertaken by a plurality of actors from those which are illegal when undertaken by a single entity. [Citations omitted] To impose Section 1 liability on what in reality constitutes a single economic

[7] For a particularly persuasive presentation of the reasons why the present intra-enterprise conspiracy doctrine inhibits effective foreign competition, see the *amicus* brief filed in behalf of the Canadian Manufacturers Association and the Canadian Chamber of Commerce, at 8-15.

enterprise would imprudently blur this purposeful distinction." (*Id.* at 588-89)

Respondent argues that if wholly-owned affiliates are not covered by Section 1, it will be left with no remedy under Section 2. (Resp. Br. 56) But this is precisely what Congress intended by the "purposeful distinction" to which the Eighth Circuit refers. Respondent's argument that there is an inadequacy in Section 2 is better presented to Congress. As Professor Areeda has stated, if there is a "gap" in Section 2, "it should be addressed by reconsidering the rules governing unilateral behavior rather than by pretending that unilateral behavior is conspiratorial." (Areeda, *supra*, at 401)[8]

Respondent's plaint about "the inadequacy of state law" as a remedy is equally unpersuasive. (Resp. Br. 57) Respondent's state law claims have already resulted in a final award of approximately $2.5 million. This award has fully compensated respondent for *all the damage* it suffered from its temporary exclusion from the steel tubing market, which was also the *only* injury resulting from petitioners' asserted "conspiracy." (*See* Pet. Br. 7) While respondent objects that

[8] In contrast to the settled distinction between Sections 1 and 2, respondent argues for an internal bifurcation of Section 2 that makes no sense and is unsupported by the authorities it cites. Respondent asserts (Resp. Br. 53) that "autonomously operated parent and subsidiary corporations" were found guilty of conspiring to violate Section 2 in *United States* v. *American Telephone & Telegraph Co.*, 524 F. Supp. 1336 (D.D.C. 1981), whereas affiliates that were subject to "close articulation of control" were 'considered together, and the offense of monopolization" was found in *United States* v. *Grinnell Corp.*, 236 F. Supp. 244 (D.R.I. 1964), *aff'd and remanded on other grounds*, 384 U.S. 563 (1966). But *Grinnell* was just as much a conspiracy to monopolize case as *AT&T*, and the differences in the exercise of control over the two sets of subsidiaries were inconsequential. The important point is that, in both cases, the parents and their subsidiaries were treated as unitary enterprises and judged by the more stringent standards of Section 2.

it will lose its treble damages, this again brings into focus the congressional scheme. Congress did not intend that ordinary business torts should give rise to treble damage relief, except where the basic plurality of actors for Section 1 liability is met, or the higher monopolization standards of Section 2 are satisfied.[9]

Respondent's reliance on other statutory provisions, such as Section 8 and Section 12 of the Clayton Act and Section 2(a) of the Robinson-Patman Act, ignores both the divergent policies they are intended to serve and the critical focus of Section 1 of the Sherman Act on "agreement."[10] As the

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[9] Respondent quotes *American Society of Mechanical Engineers* v. *Hydrolevel Corp.*, 456 U.S. 556, 569 (1982), for the proposition that the Court "can honor the statutory purpose best by interpreting the antitrust private cause of action to be at least as broad as a plaintiff's right to sue for analogous torts ...." (Resp. Br. 57) The language omitted by the elipsis is crucial: "*absent indications that the antitrust laws are not intended to reach so far.*" (Emphasis added)

[10] Respondent's own principal authority regarding Section 8 of the Clayton Act, *In re Borg-Warner Corp.*, 3 Trade Reg. Rep. (CCH) ¶ 22,049 (F.T.C. June 23, 1983), notes the peculiar statutory background and judicial interpretation of that section (*see, e.g.*, pp. 22,673-79; Bailey, concurring), and points out that "the criteria for deciding when a subsidiary's activities should be imputed to its parent corporation are based on the purpose of the law in question." (*Id.* at p. 22,663)

Respondent is on even weaker ground in citing to parent-subsidiary law under the venue provisions of Section 12 of the Clayton Act. (Resp. Br. 55 n.49) Summarizing the recent cases, Professor Blumberg states:

> "The existence of operational *ability* to influence [the subsidiary] is sufficient, and this may be demonstrated in significant part by the extent of the economic integration of the corporate components. Proof of *exercise* of the potential legal controls that exist in every parent-subsidiary relationship is not required." (Blumberg, *supra*, at 183; emphasis in original)

(footnote continued on next page)

Solicitor General stated: "the concept of 'agreement,' which is central to Section 1, has little meaning in the context of commonly owned and controlled corporations." (U.S. Br. 16)

D. A legal control rule would provide predictability for bench, bar and business.

Finally, an uncomplicated rule that parents and their wholly-owned affiliates are incapable of Section 1 conspiracy would end the current proliferation of confusing and conflicting standards. The truth is that, in over 35 years since *Yellow Cab*, the lower courts have struggled without success to resolve the intra-enterprise conspiracy dilemma. At least four divergent approaches have been articulated (Pet. Br. 32-41), and respondent now advances still another. We urge this Court to end this escalating disarray and adopt the test proposed by petitioners, which can be easily administered and is fully consistent with sound antitrust and economic principle.

(footnote continued from preceding page)

The four cases cited by respondent for an allegedly different rule under the Robinson-Patman Act (Resp. Br. 54 n.49) are effectively disposed of by the recent decision in *Security Tire & Rubber Co.* v. *Gates Rubber Co.*, 598 F.2d 962 (5th Cir.), *cert. denied*, 444 U.S. 942 (1979). The Fifth Circuit stated that it could find "no reported decision in which a Robinson-Patman Act damage award was actually sustained" on the basis of respondent's "control" test, and concluded: "[W]e deem it sensible to treat parent corporation and wholly-owned subsidiary corporation as a single economic unity. . . . The realistic effect on competition should control rather than esoteric and theoretical possibilities. . . ." (*Id.* at 966, 967)

Conclusion

The judgment should be reversed and the case remanded for entry of judgment in favor of petitioners on the antitrust issue.

Respectfully submitted,

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